

Violence and Intimidation

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Civil Provisions of the FHA

- Found at section:
 - 42 U.S.C. §3617

Criminal Provisions

- Found at section:
 - Title 9 Section 901 – 902 of the Civil Rights Act
- Unethical to threaten Criminal Action to settle civil matter.

Civil Penalties

- 42 U.S.C. §3612(g)(3)(A); 24 C.F.R. §180.671.
- \$11,000; \$27,500; \$55,000.
- Criteria for imposition:
 - Nature and circumstances of violation.
 - History of prior violations.
 - Financial circumstances of respondent.
 - Goal of deterrence and other matters.

EXPERT TESTIMONY

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The Daubert Problem

- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)
- *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)

Holdings of Daubert & Kumho

- Trial judge has a gate-keeping function regarding expert testimony under Rule 702
- Expert testimony must have “evidentiary reliability,” i.e., “a valid....connection to the pertinent inquiry as a precondition to admissibility.”
- Judge must determine if testimony has “a reliable basis in the knowledge and experience of the [relevant] discipline.”

Factors to be Considered

- Whether the theory or technique can be and has been tested
- Whether it has been subjected to peer review
- The rate of error
- Are there standards controlling the technique's operation?
- Is it generally accepted in the relevant scientific community?

Daubert Can Apply to Testing

- Applies whenever the factual basis, data, principles, methods, or their application are called into question
- *Met. St. Louis Equal Housing v. Gundaker*, 130 F. Supp.2d 1074 (E.D. Mo. 2001) (*Gundaker I*)
- *Met. St. Louis Equal Housing v. Gundaker*, 132 F. Supp.2d 1210 (E.D. Mo. 2001) (*Gundaker II*)

Attorney's Fees: "Here's Another Fine
Mess You've Gotten Me Into"

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Attorneys' Fees

- Found in 3 different sections of FHA
 - 42 USC §3612(p) [HUD proceedings]
 - 42 USC §3613(c)(2) [Civil Actions in Court]
 - 42 USC §3614 [Interveners]
- Modeled after 42 USC §1988

How Do You Get A Fee Award?

- Be a Prevailing Party
- Submit a Documented Fee Petition
- Prove Your Hourly Rate
- Eliminate Lost Discrete Claims
- Exercise Billing Judgment
- Account for the Degree of Success
- Justify Out of Pocket Expenses

When Has A Plaintiff Prevailed?

- Necessity of Relief On the Merits
- Changes the Legal Relationship of the Parties
- Significant Issue In the Litigation
- *Texas St. Teachers Ass'n v. Garland Indept. Sch. Dist.*, 489 U.S. 782 (1989)

Relief Must Be Obtained By:

- Enforceable Judgment on the Merits
- Consent Decree
- Court Approved Settlement
- *Buckhannon Bd. & Care Home, Inc. v. West Va. Dept. of Health & Human Resources*, 532 U.S. 598 (2001)

How To Crash & Burn

- Recovery of Only Nominal Damages
- Obtain a Technical Victory
- Procedural Victories Do Not Qualify
 - Reversal of Dismissal on Appeal
 - TRO
 - Preliminary Injunction
 - Stay Pending Appeal

More Ways To Crash & Burn

- Victory On Supplementary Claim if Federal Claim is Lost
- Obtaining A Private Settlement
- Believing In the Catalyst Theory

Buckhannon – The Majority

- Catalyst Theory Language in *Hewitt v. Helms*, 482 U.S. 775, 760 (1987) was *dicta* and is now dead.

Rehnquist Analysis

- Prevailing Meant Receipt of Court-Ordered Relief in the Form of a Judgment on the Merits
- Prevailing Could Come From A Consent Decree
- Focus Was On Court Ordered Relief
- Catalyst Theory Was Dead
- Private Settlements Don't Qualify

The Holding On Prevailing

- Obtain An Enforceable Judgment on the Merits
- Obtain a Consent Decree
- Any Settlement Must Have a *Judicial Imprimatur*

What Does Not Count

- Private Settlements
- Confidential Settlements
- Declaratory Judgments

The Dissent

- A Court Approved Settlement Will Do
- Decision Impedes Access to the Courts
- This is the Only Case Where *Black's Law Dictionary* Is the Last Word
- Decision Defies Common Sense

The Fallout

- Meaning of Prevailing Party Narrowed
- District Court Has No Authority To Enforce Purely Private Settlements
- Judges Must Now Be Actively Involved In Every Fee Shifting Case
- More Trials

More Fallout

- More Private Settlements Will Resolve Fee Issues
- Litigation Over Judicial Imprimatur
- Exceptions Depend on Statutory Language

What's A Lawyer To Do?

- Get A Judgment
- Get a Consent Decree
- Get a Court Approved Settlement
- Avoid the Problem of Mootness

About Mootness Claims

- Add a Damages Claim
- Don't Roll Over
- Make Them Prove It
- Examine All Aspects of the Claim
- Claim Must Be Consistent With Other Actions Taken by Defendants

Need Help, Have Questions?

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